Mayban Securities Sdn Bhd v See Joon Siong

HIGH COURT (KUALA LUMPUR) — SUIT NO D1–22–470 OF 2000(2)
VINCENT NG J
27 JUNE 2003

Civil Procedure *— Stay of proceedings — Application for — Pending appeal — Whether special circumstances existed — Whether court should exercise its discretion in granting a stay*

The defendant's appeal against the summary judgment vide encl 26 was dismissed and an appeal had been filed to the Court of Appeal against the decision. This is the defendant's application for a stay of execution (encl 39) of the judgment pending the hearing of his appeal to the Court of Appeal. The defendant sought to invoke all three ingredients in his bid to persuade the High Court that there existed special circumstances that warranted the stay of the execution of the money judgment entered against him. The three essential ingredients that were necessary to warrant the exercise of discretion in favour of a stay were, namely: (i) where 'the balance of convenience' was in favour of the applicant; (ii) where 'it was apparent that unless a stay was granted the applicant's appeal would be rendered nugatory'; and (iii) that the applicant 'had an arguable' appeal.

Held, dismissing the defendant's appeal in encl 39 with costs:

(1) The risk of a defeated litigant losing his employment ought not, for obvious reasons, constitute a special circumstances ingredient, since virtually every judgment debtor on a large judgment debt could claim to be exposed to such risk. Even so, considering that the defendant in the instant case was able to furnish the plaintiff a deposit of RM5.6m within a space of one month, his failure to make full disclosure of his current financial situation presented the High Court with no cogent reasons to explore and speculate on the threat to his continued employment prospects (see p 86D–F).

(2) Further, however novel the defendant's 'job factor' was, it remained untenable for the simple reason it was premised on the assumption that the plaintiff would proceed against the defendant by way of bankruptcy. Although the threat of bankruptcy was real and not some chimera, the High Court could not be called upon to conjecture on the plaintiff's possible choices of execution (see p 86F–G); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 followed.

(3) During the hearing of the appeal (vide encl 26), in addition to the fact that there was no dispute on the quantum claimed by the plaintiff, the defendant's liability arose from the indemnity clause which was original and independent (see pp 86I–87A); *Perwira*

Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Ors [1989] 2 MLJ 476 followed. A

[Bahasa Malaysia summary

Rayuan defendan terhadap penghakiman terus melalui lampiran 26 ditolak dan satu rayuan telah difailkan ke Mahkamah Rayuan terhadap keputusan tersebut. Ini adalah permohonan defendan untuk satu penggantungan perlaksanaan (lampiran 39) penghakiman sementara menunggu perbicaraan rayuan beliau di Mahkamah Rayuan. Defendan memohon untuk menggunakan semua tiga unsur-unsur dalam permohonan beliau untuk meyakinkan Mahkamah Tinggi bahawa terdapat keadaan-keadaan yang istimewa untuk mewarankan penggantungan perlaksanaan penghakiman wang tersebut terhadap beliau. Tiga unsur-unsur penting yang perlu untuk mewarankan penggunaan budi bicara untuk berpihak kepada satu penggantungan, adalah: (i) di mana 'the balance of convenience' berpihak kepada pemohon; (ii) di mana 'it was apparent that unless a stay was granted the applicant's appeal would be rendered nugatory'; dan (iii) bahawa pemohon 'had an arguable' rayuan. B C D

Diputuskan, menolak rayuan defendan dalam lampiran 39 dengan kos: E

(1) Risiko seorang litigan yang kalah untuk hilang pekerjaannya tidak sepatutnya, bagi sebab yang nyata, membentuk suatu keadaan istimewa, kerana pada hakikatnya setiap penghutang penghakiman akan mendakwa akan terdedah kepada risiko sedemikian. Begitupun, dengan mengandaikan bahawa defendan dalam kes semasa mampu untuk mengemukakan kepada plaintif satu deposit berjumlah RM5.6j dalam tempoh sebulan, kegagalan beliau untuk membuat pendedahan penuh terhadap keadaan kewangan semasa beliau memberikan Mahkamah Tinggi tiada sebab yang meyakinkan untuk memeriksa dan membuat spekulasi terhadap ancaman kepada peluang pekerjaan beliau berterusan (lihat ms 86D–F). F G

(2) Tambahan pula, walaupun baru 'job factor' defendan, ia tetap tidak diterima oleh sebab ia berdasarkan atas tanggapan bahawa plaintif akan memulakan tindakan terhadap defendan melalui kebankrapan. Walaupun ancaman kebankrapan adalah betul dan bukan khayalan, Mahkamah Tinggi tidak boleh dipanggil untuk meneka pilihan yang mungkin digunakan untuk perlaksanaan (lihat ms 86F–G); *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 diikut. H

(3) Semasa perbicaraan rayuan (melalui lampiran 26), ditambah kepada fakta bahawa tidak terdapat sebarang pertikaian berhubung kuantum yang dituntut oleh plaintif, liabiliti defendan I

timbul dari fasal indemniti yang adalah asli dan berasingan (lihat ms 86I–87A); *Perwira Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Ors* [1989] 2 MLJ 476 diikut.]

Notes

For cases on applications for stay of proceedings, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5503–5513.

Cases referred to

Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd [2000] 6 MLJ 493 (refd)

Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd [2002] 3 MLJ 49 (folld)

Perwira Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Ors [1989] 2 MLJ 476 (folld)

Legislation referred to

Rules of the High Court 1980 O 14

Anantha Krishnan (*Ariffin Raj De Silva*) for the appellant/defendant.
Ravindra Kumar (*Raja Darryl & Loh*) for the respondent/plaintiff.

Vincent Ng J:

Preamble

On 1 March 2002, judgment was entered against the defendant pursuant to O 14 of the Rules of the High Court 1980, on the following terms:

(i) the sum of RM39,488,819.61;

(ii) arrears interest in the sum of RM7,580,318.83 as at 10 August 1999;

(iii) interest on RM39,488,819.61 at 12%pa from 11 August 1999 till date of full settlement; and

(iv) costs.

The defendant's appeal against the said summary judgment vide encl 26 was dismissed on 13 November 2002. The defendant has since filed an appeal to the Court of Appeal against this decision.

Enclosure 39 is the defendant's application for a stay of execution of the judgment dated 1 March 2002 pending the hearing of his appeal to the Court of Appeal.

The law

I have consistently maintained that regardless of the terminology adopted, the three essential ingredients (the traditional ingredients) that are

necessary to warrant the exercise of discretion in favour of a stay are, namely:

(i) where 'the balance of convenience' is in favour of the applicant;

(ii) where 'it is apparent that unless a stay is granted the applicant's appeal would be rendered nugatory'; and

(iii) that the applicant 'has an arguable' appeal.

(See *Jaya Harta Realty Sdn Bhd v Koperasi Kemajuan Pekerja-Pekerja Ladang Bhd* [2000] 6 MLJ 493.)

Special circumstances

Aside from pointing out the fact that the quantum in this case was colossal, the defendant sought to invoke all three ingredients in his bid to persuade this court that there existed special circumstances that warranted the stay of the execution of the money judgment entered against him.

The defendant's financial constraints and the fact that he stood the risk of losing his present employment, should he be adjudicated a bankrupt, was advanced as a compelling ground to assert that his appeal would be rendered nugatory if a stay is not ordered. In my judgment, the risk of a defeated litigant losing his employment ought not, for obvious reasons, constitute a special circumstances ingredient, since virtually every judgment debtor on a large judgment debt could claim to be exposed to such risk.

Even so, considering that the defendant in the instant case was able to furnish the plaintiff a deposit of RM5.6m within a space of one month (exh LWK 2 encl 40), his failure to make full disclosure of his current financial situation presents this court with no cogent reasons to explore and speculate on the threat to his continued employment prospects.

Further, however novel the defendant's 'job factor' was, it remains untenable for the simple reason it was premised on the assumption that the plaintiff would proceed against the defendant by way of bankruptcy. Although the threat of bankruptcy is real and not some chimera, this court can not be called upon to conjecture on the plaintiff's possible choices of execution.

I am reminded of and completely ad idem with the following portion of the judgment of Court of Appeal in *Ming Ann Holdings Sdn Bhd v Danaharta Urus Sdn Bhd* [2002] 3 MLJ 49 at p 70:

> ... The grounds relied on by the appellant are nothing more than 'fear of losing'; fear of losing business, fear of losing customers, fear of losing suppliers, fear of losing goodwill, fear of not being able to collect its debts from third parties, in case the appellant company is wound up. All the applicant has to do to avoid such 'fears' is to settle the judgment debt.

During the hearing of the appeal (vide encl 26) before me, in addition to the fact that there was no dispute on the quantum claimed by the plaintiff, I found that the defendant's liability arose from the indemnity clause which

A was original and independent. In light of this, I remain unpersuaded that the defendant has an arguable appeal.

I find support in the views expressed by Gunn Chit Tuan J (as he then was) in *Perwira Habib Bank Malaysia Bhd v Syarikat Johor Tenggara Sdn Bhd & Ors* [1989] 2 MLJ 476 at p 479:

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> ... [in] hearing commercial cases, [courts should] recognize business realities by taking notice of the commercial purpose of guarantees, the purport, utility and obvious intent of which are to ensure that the creditors would be paid early by the guarantors when the principle debtors are unable or unwilling to do so.

C *Conclusion*

Upon careful perusal of the application, all four supporting affidavits and the written submissions put in by both sides, I dismiss the defendant's appeal in encl 39 with costs.

D *Postscriptum*

The appeal to the Court of Appeal dated 28 May 2003 by the defendant — against my decision refusing stay — is quite unnecessary, as it would have been much speedier for him to promptly move the Court of Appeal for a stay; that he has contended (before me) he urgently requires to avert or
E forestall 'losing his present employment'. Considering that this appeal-route adopted by the defendant would in normal circumstances take some considerable time to resolve, it belies his primary contention that there is imminent risk that he may lose his present employment.

Defendant's appeal in encl 39 dismissed with costs.

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Reported by Ezatul Zuria Azhari

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